

Section 307(c)(3) provides as follows:

“ Terms of Licenses. —

(3) CONTINUATION PENDING DECISION. — Pending any hearing and final decision on such an application and the disposition of any petition for rehearing **pursuant to section 405, the Commission shall continue such license in effect.** (emphasis added)

PCI timely filed an appeal with the D.C. Circuit as provided for under Section 402 of the Act. The subject translator licenses **continue in effect pending the outcome of the appeal, as does PCI's authority to continue to operate its translators.** This is because Section 405 provides for filing of petitions for reconsideration of Commission action. However, 405(a) states that: “The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, or action....”. Therefore, it is not necessary to file a petition for reconsideration before seeking judicial review. Furthermore, Section 405(b)(2) also specifies that appeals taken under Section 402(a) come within the scope of Section 405(b)(2). Therefore, under Section 307(c)(3) PCI has FM translator licenses which continue in effect, pending a final decision on PCI's applications for license renewal, including the “finality of a decision” which extends through to completion of judicial review, even to the U.S. Supreme Court PCI's licenses, and its right to continue to operate the FM translators, remain valid under the above-referenced provisions of the Act, which require that the FCC continue the licenses in effect until a final decision is reached. Thus, the FCC action in the Termination Order requiring PCI to cease operation of its FM translators also became null and void upon the timely filing of the notice of appeal because the licenses to operate “continued in effect” .....

The FCC policy is and has always been to permit a licensee to continue to operate pending completion of an appeal. This policy is based on Section 307 of the Act. This policy has been articulated by the FCC as follows:

“Generally, we permit a disqualified broadcast licensee to continue operations during judicial appeals to ensure service to the public until the court resolves the licensee's qualifications. *See Pinelands, Inc.* 7 FCC Rcd 6058, 6061 n.12 (1992)....” Footnote 10, FCC 02-32.

Although, the FCC would imply that the Commission has discretion to decide who can and who cannot operate during judicial appeals....no such discretion can be found either in the Act or in FCC Rules or FCC policy. In fact, since the beginning of the Communications Act in 1934, there has never been a case where a licensee was denied the right to continue operation pending appeal of the denial or dismissed license renewal application...except, of course, in PCI's case. Moreover, all the past case law favors continued operation. *See* for example, *the Application for Faith Center, Inc.*, 82 FCC 2d 1, 40 (1980), *Application for Pinelands, Inc.*, and more recently, the case Of *Contemporary Media, Inc. v F.C.C.*, 215 F. 3d 187 (D.C. Cir. 2000. **The Contemporary**

Media case is especially noteworthy because it involved a heinous crime of sexual abuse of children with a convicted felon and license revocations in 1997. Michael Rice, the principal owner of Contemporary Media, was allowed to continue operation until nearly the end of 2001, (nearly four years) pending “finality”, which included an appeal to the U.S. Supreme Court (which subsequently was denied). Even after finality, Rice (the licensee) was given another 90 day extension with ~~an~~ STA authorization to continue to operate. In contrast, PCI was ordered off the air within one day.. ..without notice. Moreover, the Commission determined that.. “in light of the record, it would have been inappropriate for the Commission to give PCI continued authority to operate”. This determination has no basis in law.. .the FCC has no such discretionary powers...and the FCC cannot deny PCI the authority to operate pending judicial review. In accord with 5 U.S.C. Section 706, a government agency is not permitted to regulate “arbitrarily and capriciously”. (PCI 1-C pages 1-4).

This basis was consistently reiterated in the testimony and cross examination of Mr. Becker at the hearing. (TR 154, 231-232, 234, 262, 266-267, 278, 370, 412-414, 420-422)

25. It was clear ~~from~~ Mr. Becker’s testimony that he had “...devoted a significant part of his last couple of years with how these things [Communications Act provisions] parse together, specific provisions that he is referring to..” and this his belief was honest, educated, and heartfelt. (TR 155). Moreover, Mr. Becker “agonized” over continuing the operation of the *Wrangell* FM translators even though he felt he was legally empowered to do so in that he did not “want to disobey the Commission..” (TR 224)

26. Mr. Becker’s belief in the correctness of his position was supported by a previous action by the Commission in connection with the Seward FM translator stations. In the MO&OI the Commission had ordered PCI to terminate the operation of the two Seward translators by April 14, 2000. (TR 415) PCI did not terminate the operation of the two Seward translators by that date, yet the Commission took no action to either enforce its order or to penalize PCI. Mr. Becker believed that the reason the Commission took no action was because PCI timely filed ~~an~~ appeal of the MO&O II with the DC. Circuit, thereby obviating the need to comply with the April 14, 2000 termination order involving the Seward translators. (TR 416) It was fortuitous

indeed that PCI did not terminate the operation of the two Seward FM translators on April 14, 2000, because in the subsequent Termination Order of May 2001 the FCC reversed its position on the termination of the *two* Seward translators. (TR 416-418) ~~Had~~ PCI terminated the operation of the two Seward translators on April 14, 2000, as ordered in the MO&O II, the licenses for the two Seward FM translator stations would have terminated automatically by the time the May 2001 Termination Order was released. (TR 417-418).

27. Moreover, ~~Mr.~~ Becker was also deeply concerned with the newly enacted provisions of Section 312(g) of the Communications Act of 1934, which specified that the license for a broadcast station is automatically forfeited without any ~~further~~ FCC action if that station fails to broadcast a signal for 12 consecutive months. (TR 224,233,360). This was of particular concern because Mr. Becker realized that his D. C. Circuit appeal could not be prosecuted to a conclusion within the 12 month period of time. (TR 224-225,233,360). He reasoned that in the event he complied with the FCC's order to terminate the operation of the *Wrangell* FM translators, and in spite of the fact that PCI was entitled to continue to operate them while prosecuting its D.C. Circuit appeal, he would effectively "...moot any appeal that would be filed in connection with the licenses which were terminated or revoked, but which continued in effect. (TR 360-361). .

### **III. CONCLUSIONS OF LAW**

#### **A. Burden of Proof.**

28. Pursuant to Section 312(d) of the Act, 47 U.S.C. § 312(d), and section 1.91(d) of the Commission's rules, 47 C.F.R. § 1.91(d), both the burden of proceeding with the introduction of evidence and the burden of proof was placed upon the Commission. (OSC at ~~para.~~ 8 and 9). The issues upon which the Commission was charged with carrying its burden of proof are as **follows**:

(a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001), and related violation of Section 416(c) of the Act;

(b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has ~~the~~ requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked. (OSC at para. 6).

No additional issues ~~were~~ specified in the proceeding following the issuance of the OSC.

#### **B. Section 416(c) of the Communications Act**

29. Section 416 (c) of the Communications Act of 1934, ~~as~~ amended, provides ~~as~~ follows:

##### **§ 416. Orders of Commission**

##### **(c) Compliance**

It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders ~~so~~ long as the same shall remain in effect.

A preliminary, but fundamental, question to be resolved in this proceeding, therefore, is whether the Termination Order requiring PCI to terminate the operation of ~~the~~ *Wrangell* FM translators was in effect during all or a portion of the applicable time period, August 29, 2001 to August 28, 2002.<sup>13</sup> The corresponding burden of proof of demonstrating that the Termination Order was in effect during all or any portion of the period in question was placed upon the Enforcement Bureau (hereafter the "Bureau") ~~as~~ the trial ~~staff~~ for the Commission. The Bureau failed to meet its burden in this regard.

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<sup>13</sup> The latter being the date that PCI terminated the operation of its *Wrangell* translator stations.

30. Section 1.103 of the Commission's rules provides for the "effective dates of Commission action; finality of Commission actions":

**Sec. 1.103 Effective dates of Commission actions; finality of Commission actions.**

(a) Unless otherwise specified by law or Commission rule (e.g. Secs. 1.102 and 1.427), the effective date of any Commission action shall be the date of public notice of such action as that latter date is defined in Sec. 1.4(b) of these rules: Provided, That the Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action. The designation of an earlier or later effective date shall have no effect on any pleading periods.

Section 1.4(b) of the rules provides at 1.4(b)(2) and 1.4(b)(4):

**Sec. 1.4 Computation of time.**

(b) General Rule--Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the day after the day on which public notice of that action is given. See Sec. 1.4(b)(1)-(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled "Public Notice" shall be calculated in accordance with this section. See Sec. 1.4(b)(4) of this section for a description of the "Public Notice" document. Unless otherwise provided in Sec. 1.4(g) and (h) of this section, it is immaterial whether the first day is a "holiday." For purposes of this section, the term public notice means the date of any of the following events: See Sec. 1.4(e)(1) of this section for definition of "holiday."

(2) For non-rulemaking documents released by the Commission or **staff**, including the Commission's section 271 determinations, 47 U.S.C 271, the release date.

(4) If the **full** text of an action document is not to be released by the Commission, but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.

The Bureau failed to present any witnesses to attest to the fact that the Termination Order was either actually released on a date certain pursuant to section 1.4(b)(2) or that a “Public Notice” was released on the Termination Order pursuant to section 1.4(b)(4). The burden was on the Bureau to present evidence in support of the fact that the Termination Order was regularly released pursuant to section 1.4(b)(2) or 1.4(b)(4) in order to make a threshold showing that it was in “effect” during the period in question. **The** Bureau having failed to meet its burden of proof in this regard, PCI cannot be found to have failed to “...to observe and comply with such orders *so* long as the *same* shall remain in effect.”

31. Moreover, under section 1.103 of the rules, the Termination Order would have to be shown to be “final” in order to be effective. The burden was on the Bureau to present evidence in support of the fact that the Termination Order was final during the period in question. The Bureau failed to present any witnesses or record evidence to support a finding that the Termination Order was final, and therefore effective, during the period of August 29, 2001 to August 28, 2002. This is significantly more important than a procedural problem.

32. In the Termination Order<sup>14</sup>, the Commission resolved a number of the outstanding questions before it **up** to that time with regard to the **Wrangell** translator stations. However, the Termination Order did not “finalize” the proceeding involving PCI for all intents and purposes. The Termination Order is entitled “Memorandum Opinion and Order And Order To Show Cause.” The Termination Order continued the **Wrangell** translator station proceeding by instituting a show cause proceeding against PCI and its two Seward **FM** translator stations. (ON 13 at page 8, para. 24) **The** Seward show cause proceeding remains pending and unresolved at the present time.

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<sup>14</sup> ON Exhibit 13.

33. The institution of the Seward show cause proceeding involving PCI and two of the FM translators that were among the corpus of the matters under consideration in the Termination Order rendered that order “non-final” for the purposes of all actions taken therein. The reason for this is simple. An order cannot be “final” for some purposes, yet “non-final” for other purposes. *Bellsouth Corporation v. FCC*, 17 F. 3d 1487 (D.C. Cir. 1994). Thus, the Termination Order cannot be “final” for the purposes of enforcing the order for the *Wrangell* FM translators to cease operation, yet not be final for the purposes of the status of PCI’s Seward FM translator licenses. The Federal courts have agreed that “finality with respect to agency action is a party-based concept” and where an agency proceeding continues, for any reason, involving a party and any portion of the corpus contained in a prior order, that order is rendered “non-final” for the purposes of all actions taken therein. *United Transportation Union v. I.C.C.*, 871 F. 2d 1114 (1989) and *I.C.C. v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360 (1987).

34. The burden was on the Bureau to prove that the Termination Order was final, and thereby enforceable against PCI. It failed to produce any witness to corroborate this fact, or any evidence in support of the finality, and thus enforceability, of the Termination Order during the period in question. Such finality, and thus enforceability, cannot be presumed where the burden of proof has been placed squarely on the Bureau. Moreover, as PCI has demonstrated, it would appear that under Federal court precedent the Termination Order was effectively rendered “non-final” and non-enforceable by the Commission, and not subject to compliance by PCI, by the institution of the show cause proceeding involving PCI and the Seward FM translators.

35. Accordingly, PCI cannot be found to “lack the requisite character qualifications to be a Commission licensee” for its failure to fully comply with a non-final Commission order to terminate the operation of the *Wrangell* translator stations when it was not legally bound to do so.

At a minimum, the Bureau has failed to meet its burden of proof that the Termination Order was final during the period August 29,2001 to August 28,2002, and thereby required compliance in conformity therewith by PCI under Section 416(c). The burden was on the Bureau to hurdle this barrier of proof, and it failed to do so.

36. There is also the unresolved problem of the exact periods of time, if any, during which PCI was under an obligation to comply with the Termination Order requirement that the *Wrangell* translator stations cease their operations. For the purposes of this proceeding, the applicable period in question is August 29,2001 to August 28,2002.

37. As noted previously, in July of 2001, the United States, at *the* request of the FCC<sup>15</sup>, and serving as its legal counsel, filed an action in the United States District Court for the District of Alaska seeking an injunction against PCI requiring that the *Wrangell* FM translator stations cease operation. The District Court initially granted a motion for a preliminary injunction, but PCI filed an appeal with the United States Court of Appeals for the Ninth Circuit. (TR 104-105, 269) During the period between the District Court ruling and the filing of the Ninth Circuit appeal, it was agreed between PCI's counsel and the FCC's counsel, the United States Attorney for Alaska, that the *status quo* could be maintained and the *Wrangell* FM translator stations could remain in operation. (TR 269-270) On November 21,2001, the Court of Appeals for the Ninth Circuit entered a stay of the injunction, allowing PCI to continue to operate the *Wrangell* FM translator stations and the FCC's counsel, the United States Attorney for Alaska, consented to this and did not seek to have the stay overturned. (TR 104-105) This injunction remained in effect until April 22,2002 when the Ninth Circuit vacated the stay, but PCI timely-filed a request for rehearing. (PCI I-C at pages 23-24).

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<sup>15</sup> 47 U.S.C. 401(c) provides that such shall be brought only at the request of the FCC.



**38.** The Ninth Circuit denied PCI's request for rehearing on July **3,2002**. (ON **19**) In its underlying order, the Ninth Circuit held that under the procedural scheme set up under the Communications Act of **1934**, only the D.C. Circuit was empowered to stay enforcement of the FCC order, and directed that PCI would need to seek relief before that venue. (ON **17** at page **10**, TR **228,370**) PCI filed its request for stay before the D.C. Circuit in July of **2002**, but the request was denied by an order released on August **13,2002**. (ON **20**). Thereupon, having exhausted its appeal court remedies, PCI terminated the operation of the *Wrangell* FM translator stations on August **28.2002**. (TR **228,346**) This was deemed an appropriate date for PCI to terminate the operation of the *Wrangell* FM translators following discussions between, and after the mutual agreement of, PCI and the FCC's counsel, the United States Attorney in Alaska. (TR **125 ,269-270**).

**39.** Thus, it would appear that during the bulk of ~~the~~ period between August **29,2001** to August **28,2002** PCI continued to operate its *Wrangell* FM translator stations with the advice and consent of the FCC's counsel in the Alaska District Court and Ninth Circuit proceedings, the United States of Attorney in Alaska. To the extent that ~~there~~ is any ambiguity in the dates, if any, that PCI operated its *Wrangell* FM translator stations without the imprimatur of either the Ninth Circuit or the United States Attorney in Alaska, the burden was on the Bureau to affirmatively show when PCI was operated outside of the stay or the times of agreement with the FCC's counsel. The Bureau failed to present any witnesses, including the United States Attorney in Alaska, or any evidence to prove any exact periods of PCI's non-compliance beyond the Ninth Circuit stay or its various agreements to continue operations with the FCC's counsel. Having failed to proffer, much less prove, such non-compliance, the Bureau has failed in its obligation to come forward with evidence under the burden of proof, and it has not been clearly established

that PCI operated its *Wrangell* FM translator stations for any length of time without either the consent of the Ninth Circuit, or the United States Attorney for Alaska, during the period in question. Accordingly, PCI cannot be found to “lack the requisite character qualifications to be a Commission licensee” for its failure to fully comply with a Commission order to terminate the operation of the *Wrangell* translator stations when during part, if not all, of the period in question it operated the stations under the imprimatur of either the Ninth Circuit or with the agreement and consent of the FCC’s counsel in Alaska.

**C. PCI’s Character Qualification to be a Commission Licensee.<sup>16</sup>**

40. The Commission’s policy regarding the character qualifications of its licensees is found in the *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179(1986), *modified in part* 1 FCC Rcd 421 (1986) (hereafter the “*Policy*”). Issues regarding FCC-related misconduct by broadcast licensees are covered in the *Policy*. *Policy* at section 4 “Issues Regarding FCC-Related Misconduct”.

41. As an initial matter, it is important to differentiate between the conduct that was the basis of the OSC, and other character-related conduct that is subject to sanctions against broadcast licensees in the *Policy*. PCI is not accused of engaging in any form of misrepresentation or lack of candor to the Commission.” To the contrary, PCI has honestly and forthrightly responded to all Commission inquiries on whether it was continuing, and intended to continue, operating its *Wrangell* FM translator stations, and the basis thereof.” It has never represented to the Commission that the translators were not operating until PCI terminated their operations on August 28, 2002. There is no record evidence of any misrepresentation by PCI.

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<sup>16</sup> For the purposes of this discussion, PCI will assume *arguendo* that it was guilty on failing to comply with the FCC termination order during the period in question.

<sup>17</sup> See paragraph 13 previously.

42. **As** a general matter, any violations of the Communications Act, Commissions rules or Commission policies have a potential bearing on character qualifications. *Policy*, 102 FCC 2d at 1209. **As** the Commission noted, “...we intend to treat any violation **of** FCC statutory or regulatory requirements as raising character concerns.” *Id* at 1210, n. **76**. The ultimate issues in this context are whether the conduct evidences probable future conduct, and whether there are mitigating factors that must be taken into effect in viewing the conduct. Moreover, the Commission has determined that there is no presumption that misconduct at one station is necessarily predictive **of** the operation of the licensee’s other stations. *Id* at 1215.

43. **The** factors that **are** appropriate for analysis when examining a licensee’s past behavior are as follows:

- a. willfulness of the misconduct, the frequency of behavior, and its currency;
- b. the licensee’s record of compliance with the FCC’s rules and policies;
- c. efforts to remedy the situation;
- d. other evidence that the licensee has the ability to operate in the public interest with no likelihood of future misconduct;
- e. license revocation is only appropriate in the most egregious cases. *Policy* at paras.

102-106.

44. **a. Willfulness of the misconduct, the frequency of behavior, and its currency.**

In the case of PCI, the failure to terminate the operation of the *Wrangell* translators was a single act of misconduct. However, as the record reflects PCI took this course in the heartfelt belief that it was doing **so** within its rights as a Commission renewal applicant whose appeal was pending before the D. C. Circuit and who was allowed to continue to operate its translators

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<sup>18</sup> See paragraph 24 previously.

pursuant to Section 405(b)(2), Section 402(a) and Section 307(c)(3) of the Communications Act, and the established Commission precedent in such cases.

45. **b. The licensee's record of compliance with the FCC's rules and policies.** Here, the record reflects that PCI has been an exemplary broadcast licensee with a spotless record since it first put its station KGTL-FM on the air in 1979.

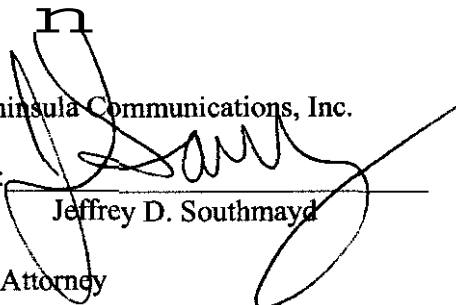
46. **c. Efforts to remedy the situation.** The record reflects that PCI went to enormous lengths to first receive a stay of the enforcement action in the District Court of Alaska, and then at the suggestion of the Ninth Circuit sought a stay before the D.C. Circuit. PCI also sought a stay of the termination from the FCC, which was never acted upon. Once PCI had exhausted these efforts, it voluntarily turned the *Wrungell* translator stations off.

47. **d. Other evidence that the licensee has the ability to operate in the public interest with no likelihood of future misconduct.** The best evidence of PCI's ability to operate in the public interest is its past record of broadcast compliance and operation in the public interest. The subject proceeding is the only taint in an otherwise exemplary 24 year broadcast record by PCI. Moreover, the Commission has previously fined PCI the sum of \$140,000.00 for its failure to terminate the operation of the *Wrungell* translator stations. *Notice of Apparent Liability For Forfeiture And Order*, FCC 01-242 (August 29, 2001). (ON 14) As the Commission found in its *Policy*, suffering such a huge loss, both in terms of the loss of the *Wrungell* licenses and this forfeiture, will likely serve to deter all but the most unrepentant from serious future misconduct. *Policy* 102 FCC 2d at 1228. In the case at hand, the loss of the *Wrungell* translator licenses and the \$140,000 forfeiture undoubtedly is a sufficient penalty to ensure that PCI will not become engaged in serious future misconduct of any kind.

and the existing legal precedent allowing broadcast stations that had been denied license renewal to continue operation while prosecuting Federal appeals. He was also caught in the “trap” of having the “Hobson’s Choice” of either obeying the Commission’s order and forfeiting PCI’s right to prosecute the D. C. Circuit appeal ~~of~~ the Termination Order once the **Wrangell** stations were off the air for 12 consecutive months under Section 312(g) of the Act”, or disobeying the Commission in order to be able to fully prosecute its Federal appeal and to continue the service to the public that his stations **provide**.<sup>20</sup> PCI chose to uphold the public interest mandate required of all FCC broadcast licensees.

#### **IV. CONCLUSION**

50. PCI may have made a mistake in the continued operation of its **Wrangell** FM translators. However, PCI did so after sober reflection and based on earnest conviction, and has been penalized **through** the loss of the licenses, the termination of the operation of the translators, and a \$140,000 forfeiture-----“that should be the end of it.” **Swan Creek Communications v. F.C.C.**, 39 F. 3d 1217 (1994).

Peninsula Communications, Inc.  
By:   
Jeffrey D. Southmayd  
Its Attorney

Southmayd & Miller  
1220 19<sup>th</sup> Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 331-4100

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<sup>19</sup> See PCI Exhibit I-c at pages 13-14 for the Commission’s interpretation of this statute.

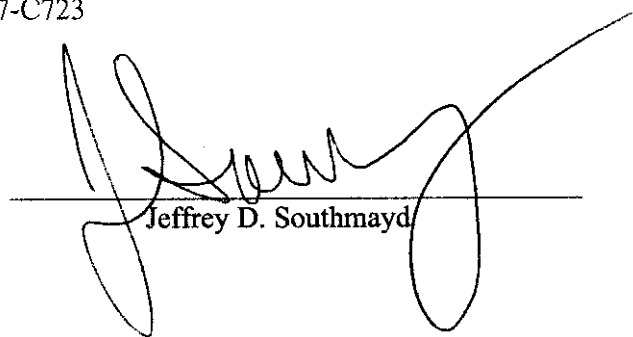
<sup>20</sup> As shown in PCI Exhibit 3, PCI’s translators in the Peninsula radio market were, according to the Arbitron survey, the most popular stations in that market. (PCI 3 at page 5)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by first class United States mail, postage pre-paid, and email **on** this 24<sup>th</sup> day of December, 2002, to the following:

Administrative Law Judge Richard L. Sippel  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 1-C749  
Washington, D.C. 20554

Mr. James Shook  
Investigations & Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W. Room 7-C723  
Washington, D.C. 20554



Jeffrey D. Southmayd